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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 920

THE SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ET AL,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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THE SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ET AL.,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners, The Southeast Texas Chapter of National Electrical Contractors Association, The Howard P. Foley Company, and Local 716 of International Brotherhood of Electrical Workers pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas (R. 10-14), which reversed the judgment of the District Court of Harris County, Texas, 61st Judicial District (R. 99). The judgment of the District Court sustained Petitioners' pleas in abatement and dismissed this State antitrust penal action for lack of jurisdiction because the alleged conspiracy admittedly involved interstate commerce within the application of Sections 1 and 2 of the Sherman Antitrust Act and was admittedly the subject matter of a Federal antitrust indictment in the United States District Court for the Southern

District of Texas pending at the same time against the same persons based upon the same facts and transactions. The Court of Civil Appeals held that state jurisdiction could be sustained even though federal jurisdiction was admittedly present and had been exercised against the same people for the same alleged conspiracy in restraint of the same alleged commerce.

The Record on file in No. 765, *Pfeiffer Electric Company* v. *The State of Texas*, in the Supreme Court of the United States, October Term, 1962, is the record and is hereby adopted as the Record on this Petition, Pfeiffer Electric Company as a codefendant with these petitioners in the action below having filed its separate petition for writ of certiorari.

OPINION BELOW

A copy of the judgment of the District Court of Harris County, 61st Judicial District of Texas, entered without written opinion, is copied herein as Appendix A. The opinion of the Court of Civil Appeals, which is reported as *The State of Texas* v. *The Southeast Texas Chapter of National Electrical Contractors Association, et al*, 358 S.W. 2d 711, is copied herein as Appendix B. The order of the Court of Civil Appeals overruling these Petitioners' motions for rehearing was entered without written opinion (R. 5-8). The order of the Supreme Court of Texas denying these Petitioners' Application for Writ of Error and its order denying Petitioners' Motion for Rehearing of Application for Writ of Error were each entered without written opinion (R. 16, 369).

Jurisdiction

The order of the Supreme Court of Texas denying these Petitioners' Applications for Writ of Error to the Court

of Civil Appeals for the Sixth Supreme Judicial District of Texas was dated and entered on October 17, 1962 (R. 16, 569), and Petitioners' Motion for Rehearing on such applications for writ of error was overruled by the Supreme Court of Texas on December 19, 1962 (R. 16, 569). The decision and judgment of the Court of Civil Appeals were dated and entered on June 12, 1962 (R. 10-14), and the motions for rehearing of Petitioners were filed in the Court of Civil Appeals within fourteen days thereafter (R. 466-509). The order of the Court of Civil Appeals overruling Petitioners' Motions for Rehearing was dated and entered on July 3, 1962 (R. 5-8), and Petitioners' Application to the Supreme Court of Texas for Writ of Error was filed within thirty days thereafter (R. 534).

The action of the Supreme Court of Texas in refusing Petitioners' Application for Writ of Error and in refusing to review the decision and judgment of the Court of Civil Appeals constituted the judgment and decision of the Court of Civil Appeals that of the highest court of the State of Texas in which decision can be had, and therefore a judgment reviewable under Title 28, United States Code, §1257, *Sullivan* v. *Texas*, 207 U.S. 416; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157. The date, however, when the judgment and decision of the Court of Civil Appeals became final was December 19, 1962, when the Supreme Court of Texas overruled Petitioners' Motion for Rehearing on Application for Writ of Error. *American Railway Express Company* v. *Levee*, 263 U.S. 19; *Adam* v. *Saenger*, 303 U.S. 59.

The judgment of the Court of Civil Appeals reversing the order of the District Court sustaining Petitioners' Pleas in Abatement and dismissing the action for want of jurisdiction is a "final judgment" within the meaning of 28 U.S.C.

1257 because it has been finally adjudicated in the state courts that the jurisdiction of the state court over the state penal antitrust action may be maintained, even though the alleged conspiracy involved interstate commerce, and has not been preempted by the federal antitrust action based on admitted federal jurisdiction asserted against the same parties on the same facts. While the action has been remanded for trial on the merits; the jurisdiction issue and the federal preemption issue have been finally adjudicated by the state courts and cannot be further litigated there. *Tynberg* v. *Cohen*, 76 Tex. 409, 13 S.W. 315. Therefore, the judgment of the Court of Civil Appeals of which review is hereby sought is a "final judgment" under 28 U.S.C. 1257. *Mercantile National Bank at Dallas* v. *C. H. Langdeau*, and *Republic National Bank of Dallas* v. *C. H. Langdeau*, ... U.S. ....., Nos. 14 and 15, October Term, 1962; *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *S. J. Curry*, ... U.S. ....., No. 87, October Term, 1962.

The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1257(3), since the validity of the antitrust statute of the State of Texas as applied in this action is drawn in question on the ground of its being repugnant, as applied in this action, to the Constitution and the laws of the United States.

Questions Presented

The suit of the State of Texas under its antitrust statutes seeks to exact penalties of from $50 to $1,500 per day for a period of many years from Petitioners and to impose the forfeiture of its corporate charter upon the petitioner association. Under Texas decisions such a suit is declared not to be "an ordinary civil case" but to be a "penalty suit" which must satisfy "the same degree of certainty that is required in a criminal case". *Ford Motor Company* v. *State*,

142 Tex. 5, 175 S.W. 2d 230, 233; *Arkansas Fuel Oil Company* v. *State*, 154 Tex. 573, 380 S.W. 2d 723. Identical statutes are contained both in the Civil Code and the Penal Code (Vernon's Ann. Tex. Stats., Articles 7426, et seq., and Vernon's Ann. Pen. Code, Articles 1632, et seq.), and a penal action like this one "is for all practical purposes a criminal action". *State* v. *Fairbanks-Morse & Co.*, 246 S.W. 2d 647, 654. The questions here presented in connection with this penal action are as follows:

(1) Can the State of Texas prosecute a penal action under its antitrust statutes against the same persons who are at the same time being prosecuted in a federal indictment under the Sherman Antitrust Act based upon the same alleged conspiracy involving restraint of the same interstate commerce arising out of the same facts and transactions?

(2) Can the State of Texas sustain jurisdiction in its courts of a penal action maintained under its antitrust statutes against a conspiracy in restraint of interstate commerce or substantially affecting interstate commerce to which the federal antitrust laws (15 U.S.C. §1, et seq.) admittedly apply and of which the United States District Court has admitted jurisdiction?

(3) Can the State of Texas sustain jurisdiction in a penal action in its courts under its antitrust statutes over an alleged conspiracy in restraint of interstate commerce or substantially affecting interstate commerce when the United States is at the same time asserting its jurisdiction under the federal antitrust laws, 15 U.S.C. §1, et seq., over the same conspiracy and the same commerce, in an action against the same persons based upon the same facts and transactions?

Constitutional Provisions And Statutes Involved

Respondent's action invokes and is based upon Article 7426-7436, Vernon's Annotated Texas Statutes, which define and prohibit and provide for the prosecution and punishment of "trusts, monopolies and conspiracies in restraint of trade". Pertinent provisions of these statutes are printed herein as Appendix C.

The pending federal indictment against the same persons based on the same facts and transactions involved in Respondent's action invokes, and avers violations of, Section 1 and Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended, c. 647, 26 Stat. 209, 15 U.S.C. Secs. 1 and 2, known as the Sherman Antitrust Act (also printed in Appendix C).

These Petitioners invoke the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3, which provides:

> "The Congress shall have power * * * to regulate commerce * * * among the several states * * *"

and the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, which provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

Petitioners assert that the Sherman Antitrust Act invoked in the pending federal indictment is the supreme law of the land governing the alleged conspiracy in restraint of commerce among the several states and that the Respond-

ent's action under the state antitrust statutes cannot be maintained against the same alleged conspiracy in restraint of the same commerce, but that state court jurisdiction is preempted and must yield. Hence, each of the questions presented should be answered in the negative.

Statement of the Case

The Texas Attorney General brought this state penal action under Article 7426, et seq., V.A.T.S., against the petitioner trade association, nine of its members, and the petitioner union, charging them with a conspiracy restraining commerce "in the sale and installation of electrical material and equipment in commercial buildings and structures and industrial facilities * * * sold and installed in the Houston area", which conspiracy is alleged to have been enforced through the petitioner union. The state action seeks to punish the petitioners for the alleged violations by imposing penalties of not less than $50 and not more than $1,500 per day for each and every day since August 15, 1951, to assess the corporate death penalty against the petitioner association by forfeiting its corporate charter, and to enjoin future violations of the Texas antitrust statutes (R. 26-41).

A federal indictment was brought in the United States District Court for the Southern District of Texas, Houston Division, against the petitioner association, six of the nine association members sued in the state action, and three officers of defendants in the state case, charging them on the basis of the same facts and transactions involved in the state action with a violation of 15 U.S.C.A., Section 1, et seq., by entering into "an unlawful combination and conspiracy to suppress and eliminate competition in the sale and installation of electrical equipment in the Houston area". The three members of petitioner association who

are defendants in the state action but not in the federal action are named as co-conspirators in the federal indictment. The petitioner labor union is also named as a co-conspirator in the federal indictment (R. 50-60).

Petitioners filed in the state court action pleas in abatement and to the jurisdiction of the state court based on the existence of federal jurisdiction and the pendency of the federal action, asserting that the state and federal actions are "separate actions for the same alleged offense growing out of the same alleged conspiracy, the same commerce, and the same alleged acts and transactions" and pleading in part:

> "Since said federal criminal action has been instituted and is now pending, and since the electrical material and equipment involved in both cases is in large part manufactured in other states and moves in the channels of interstate commerce from said other states to the State of Texas, the jurisdiction of said United States District Court is paramount and exclusive and the jurisdiction of this Court of the State of Texas to proceed with and to try the above action has been preempted, superseded and displaced" (R. 41).

The federal indictment alleges that "from 75% to 90% of the electrical equipment sold and installed in the Houston area is manufactured in states other than Texas and is shipped in interstate commerce from said states to the Houston area for sale and installation therein"; that "in 1956 said interstate commerce was in excess of $6 million"; and that Petitioners and other members of the petitioner trade association "are conduits through which electrical equipment produced in states other than Texas is sold and distributed to consumers in the Houston area" and that "said electrical equipment flows in a continuous, uninterrupted stream from its points of origin in states other than Texas to its places of installation and use within the

Houston area" (R. 50-60, 79-85). The uncontroverted evidence at the hearing on the pleas in abatement and to the jurisdiction was that *substantially all* electrical equipment sold and installed in the Houston area is manufactured in other states and that much of it is shipped directly from manufacturers in other states through the channels of interstate commerce to job sites in the Houston area (R. 121-139).

The District Court of Harris County, Texas, after hearing, sustained Petitioners' Pleas in Abatement and to the Jurisdiction and ordered the state court action in all things abated and dismissed.

Petitioners invoked the Commerce Clause and the Supremacy Clause of the Constitution of the United States, which make the Sherman Antitrust Law (15 U.S.C. 1, et seq.) the "Supreme Law of the Land" governing conspiracies restraining interstate commerce (or intrastate commerce which substantially affects interstate commerce), in support of the ruling of the trial court in their first Brief in the Court of Civil Appeals (R. 366-pp. 3 and 23 of the printed Brief).

The Court of Civil Appeals held "that the Texas courts can proceed, in anti-trust suits, without reference to a Federal court action, even though the same parties and the same subject matter are involved in both actions"; that the state action can be maintained as "state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce"; and that "the same consideration would be involved * * * if no federal indictment was pending". In the second ground of Motion for Rehearing in the Court of Civil Appeals, Petitioners assigned this holding as being a construction and an application of the antitrust statutes of the State of Texas which contravene the Commerce Clause and the Supremacy Clause of the Constitution of the United States (R. 466, et seq.).

Petitioners urged the same point on the Supreme Court of Texas both in Application for Writ of Error and on Motion for Rehearing on Applications for Writ of Error (R. 558).

Petitioners at every stage in the state courts have carefully preserved and strenuously urged the important and substantial federal question, which though variously stated, always embodied this proposition:

> "The Supremacy Clause and the Interstate Commerce Clause of the United States Constitution Preclude a State Antitrust Penal Action Which Duplicates a Federal Antitrust Prosecution Based Upon Admitted Federal Jurisdiction".

REASONS FOR GRANTING THE WRIT

The Respondent has admitted that "the state's petition and the federal indictment are both based on the same acts and transactions" (R. 288, Appellant's Brief, Court of Civil Appeals, p. 4), and the Court of Civil Appeals opinion asserts agreement: "The Federal criminal indictment is based upon the same transactions; and, a violation of the interstate commerce laws". Respondent has admitted the involvement of interstate commerce and the presence of federal jurisdiction by declaring that "in the case at bar, there is undoubtedly both interstate and intrastate commerce involved" and that the courts "in situations very similar to that here presented, have sustained the applicability of the Sherman Act saying that interstate commerce is 'substantially affected' " (R. 288, Appellant's Brief, Court of Civil Appeals, pp. 12-14). The Respondent then states the question of law to be:

> "The question then is whether the state antitrust enforcement must end where interstate commerce is substantially affected and when the federal enforcement has begun". (Appellant's Brief, Court of Civil Appeals, p. 14).

The Respondent admits (Appellant's Brief, Court of Civil Appeals, p. 9) and the Court of Civil Appeals opinion states:

> *"Neither the Supreme Court of Texas nor the United States Supreme Court has heretofore considered the question of whether a Federal indictment under the Sherman Act is preemptive and excludes Texas from bringing a civil action for an alleged violation of local antitrust laws".*[1]

Respondent, in characterizing the question as important and unique, has further declared:

> *"The federal courts or the Texas Supreme Court have not ever been confronted with the precise argument here presented by Appellees. The issue of whether the institution of a federal criminal action displaces the state's right to proceed with enforcement of its antitrust statutes is a unique one indeed * * *"* (Appellant's Brief, Court of Civil Appeals, p. 47).

The Court of Civil Appeals has answered this substantial and important question, not heretofore answered by the United States Supreme Court, by holding "that the Texas courts can proceed, in antitrust suits, without reference to a Federal court action, even though the same parties and the same subject matter are involved in both actions".

POINT ONE

The Texas Court of Civil Appeals Has Decided a Question Which Has Not Been Passed on by the United States Supreme Court in a Way Contrary to Every Known Judicial Expression on the Subject by Holding that Both State and Federal Antitrust Prosecutions May be Maintained Against the Same Persons on the Same Facts, the Same Conspiracy, and the Same Commerce at the Same Time.

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[1] All emphasis within quotation marks in this Petition is supplied.

The Court of Civil Appeals opinion holds something that *no* discovered opinion in *any* reported case *anywhere* up to this opinion had ever held. There is simply *no known court anywhere* heretofore that has ever held that a state antitrust action may be maintained in addition to a federal antitrust action against the same parties based upon the same acts and transactions and the same conspiracy in restraint of the same commerce. While the United States Supreme Court has not adjudicated the question, it has declared its utter disbelief that both federal and state antitrust prosecutions of the same persons based on the same facts would even be attempted.

In *Brown* v. *Walker*, 161 U.S. 591, 40 L. Ed. 819, 16 S. Ct. Rep. 644, it was held that the "bare possibility" that a witness granted immunity from prosecution by the federal government for giving self-incriminating testimony in an action under a federal statute might nevertheless be subjected to the criminal laws of the state "was so improbable that it need not be taken into account". In the later case of *Jack* v. *Kansas*, 199 U.S. 372, 50 L. Ed. 234, 26 S. Ct. 73, it was held in a case where a witness was granted immunity in an action under the state antitrust laws that a federal antitrust prosecution was "a danger so unsubstantial and remote" that it need not be taken into account under the holding in *Brown* v. *Walker*, *supra*. Still later in *Feldman* v. *United States*, 322 U.S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082, the Supreme Court explained the "phrase of skepticism" in *Jack* v. *Kansas*, *supra*, "*that it could hardly be imagined 'that such prosecution would be instituted under such circumstances'*" as follows:

> "The 'prosecution' and the 'circumstances' there referred to were a prosecution on the same facts for violation of the state and federal anti-trust laws".

In this action there has occurred what the Supreme Court thought "could hardly be imagined", i.e., "a prosecution on the same facts for violation of the state and the federal antitrust laws". The Antitrust Division of the United States Department of Justice has vigorously contended for this harsh and oppressive program of double prosecutions in an amicus curiae appearance in the Court of Civil Appeals both by brief and oral argument (R. 419-465). But the decision of the Texas Court of Civil Appeals that Congress intended to permit such double prosecutions when it enacted the Sherman Act stands alone. Every other known judicial expression is to the contrary.

In *Leader Theatre Corporation* v. *Randforce Amusement Corporation*, 58 N.Y.S. 2d 304, 308 (Sup. Ct. 1945), aff'd. 76 N.Y.S. 2d 846 (Sup. Ct. App. Div. 1948), the court held that the New York antitrust statute could be enforced against a conspiracy restraining intrastate commerce affecting interstate commerce only if "*no federal agency has acted with respect to the particular matter being considered by the state agency.*" State action was held permissible in this case because "*no specific intervention on the part of any federal agency in the instant case*" had been brought to the attention of the court.

In *Ritholz* v. *Ammon*, 240 Wis. 578, 4 N.W. 2d 173 (1942), the Supreme Court of Wisconsin held that the State Department of Agriculture could maintain a complaint against false and misleading advertising constituting an unfair trade practice or unfair competition under the state statute because the business was "an essentially local and intrastate one, and only incidentally affects interstate commerce". However, the court further held that the state complaint could not be maintained if the Federal Trade Commission had instituted an unfair trade practice complaint against the same firm based on the same matter

under the federal statute "because both departments would be attempting to deal with the same conduct of plaintiffs". The court then said at 4 N.W. 2d 178:

> *"In such a situation, no doubt, the state would have to yield".*

Despite the statement in the opinion of the Court of Civil Appeals in the present case to the contrary, the Supreme Court of Wisconsin reaffirmed this holding in *State of Wisconsin* v. *Allied Chemical & Dye Corporation*, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960), citing with approval its prior decision in *Ritholz* v. *Ammon, supra*, while holding that a prior Federal Trade Commission administrative proceeding to curb an alleged unfair trade practice did not bar current action by the Wisconsin attorney general under the state antimonopoly statute because the two were dealing with different conduct, the court stating at 101 N.W. 2d 135:

> "The Federal Trade Commission was not established to enforce the federal anti-monopoly statutes".

In the still later case of *State of Wisconsin* v. *Texaco, Inc.*, Wis. 2d , 111 N.W. 2d 918 (1961), which is not even cited in the Court of Civil Appeals opinion in the present case, it was held that a Wisconsin unfair trade practice proceeding would be precluded and preempted by a Federal Trade Commission unfair trade practice proceeding if the two *"are in fact prosecutions for the same violation"*. The court then declared at 111 N.W. 2d 921:

> *"Whether these cases are in fact prosecutions for the same violation cannot be decided in a factual vacuum. This state is not precluded from the exercise*

> *of its police power on the mere possibility that a conflict of jurisdiction exists with the Federal Government; such conflict must be factually verified".*

The concurring opinion in the same case at 111 N.W. 2d 923 comments that the practices being prosecuted in the federal case "may be, but are not necessarily, similar in substance to those under attack in this action". This late opinion by the Supreme Court of Wisconsin clearly conflicts in principle with the holding of the Court of Civil Appeals in the present case because the Wisconsin court recognizes that the state proceeding will be preempted and precluded if the state and federal proceedings "are in fact prosecutions for the same violation", but holds that "such conflict must be factually verified". Respondent admits and the Court of Civil Appeals holds that Respondent's penal action and the federal indictment "are in fact prosecutions for the same violation", but the Court of Civil Appeals nevertheless holds that both can be maintained.

In *Commonwealth* v. *McHugh*, 93 N.E. 2d 751 (1950), the Supreme Judicial Court of Massachusetts held that a state antitrust action could proceed in a case where no federal antitrust action had been instituted even though interstate commerce was affected, but declared at 93 N.E. 2d 762:

> *". . . If there should be a conflict between the State law and the Federal law, the Federal law would of course prevail whenever interstate commerce was involved.* A state court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State *lest it discover later that it has retreated where the Federal government will not advance and therefore been derelict in its duty".*

It is inherent in the quoted language that if the federal government does "advance" in the same case, as it has here by grand jury indictment, then the state action cannot be maintained and "the Federal law would of course prevail".

POINT TWO

It Was Not Congressional Purpose And Intention In Enacting The Sherman Act To Permit Double Prosecutions And Double Punishments Of Conspiracies Involving Restraint Of Interstate Commerce.

The Court of Civil Appeals has held in the context of duplicate state and federal prosecutions of the same alleged conspiracy in restraint of the same commerce as follows:

> "The state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce, is supplementary to the Federal regulatory scheme".

This holding in effect denies federal preemption on the basis of finding a congressional purpose and intention in enacting the Sherman Act to permit double punishment of the same conspiracy against the same commerce. This holding is contrary to the declaration of the Supreme Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497, 100 L. Ed. 640, 76 S. Ct. 477 (1956), in which the court declared that it was "not unmindful of the risk of compounding punishments which would be created by finding concurrent state power" in its holding that a state sedition statute could not be applied in the same area covered by a federal sedition statute. The Court enunciated the principle that it

would "not assume that Congress intended to permit the possibility of double punishment".[2]

The legislative history of the enactment of the Sherman Act seems to Petitioners to be substantially conclusive that Congressional purpose and intent in the enactment of the statute was that it would go to the full limit of the power of Congress to regulate commerce and that the states would not have power to act through their antitrust statutes in any area within the scope of the federal statute. A brief resume of some of the highlights of this legislative history is printed as Appendix D to this Petition. It completely negates any concept of state antitrust prosecutions duplicating federal antitrust prosecutions of the same conspiracies in restraint of the same commerce.

Furthermore, Texas court decisions have heretofore long recognized that the Texas antitrust statutes do not apply to a conspiracy in restraint of trade in a product manufactured in another state and moving in the channels of interstate commerce to points of sale or installation in Texas, even though the conspiracy was formed in Texas and operates as to Texas installations or deliveries. *Albertype Co.* v. *Gust-Feist Co.*, 10 Tex. 219, 114 S.W. 791; *The State of*

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[2] The reliance by Respondent below on *Bartkus* v. *Illinois*, 359 U.S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666 (1959), is ill founded because these are double jeopardy and due process cases and not preemption cases. Neither the Commerce Clause nor the Supremacy Clause was invoked or involved. "It is one thing for the court to rule, as in the double jeopardy cases, that successive state and federal prosecutions are not prohibited either by the Fifth Amendment or the Vague Contours of the Fourteenth Amendment; it would be quite another thing for the court to find that Congress intended to permit double punishments". Dillon, 39 *Texas Law Review* 807. It should be pointed out that the issue under the Fifth Amendment, however, is still alive and undecided. *Slagle* v. *Ohio*, 366 U.S. 259, 6 L. Ed. 2d 277, 81 S. Ct. 1076 (1961).

Texas v. *Fairbanks-Morse Co.*, 246 S.W. 2d 647 (Tex. Civ. App. 1952). The Fifth Circuit Court of Appeals has very recently asserted this same proposition. *Denison Mattress Factory* v. *The Spring-Air Company*, 308 F. 2d 403 (5 Cir. 1962). Indeed the Fifth Circuit Court of Appeals has held that facts substantially identical to those in this case, i.e., electrical equipment manufactured in other states moving in a continuous stream of interstate commerce through Texas contractors as conduits to final places of delivery and installation in Texas, constitute an "in commerce" conspiracy under the Sherman Act and not merely a conspiracy in restraint of intrastate commerce which substantially "affects interstate commerce." *United States* v. *Northeast Texas Chapter, National Electrical Contractors Association*, 181 F. 2d 30 (5 Cir. 1950). This holding is in accord with *Las Vegas Merchant Plumbers Association* v. *United States*, 210 F. 2d 732 (9 Cir. 1954), cert. denied, 348 U.S. 817 (1954), and each is sustained by decisions of this Court. *United States* v. *Employing Plasterers Association of Chicago*, 347 U.S. 186; *United States* v. *Employing Lathers Association of Chicago*, 347 U.S. 198 (1954). Further, the Respondent has admitted that the Texas antitrust statutes would be inapplicable to the facts in issue here under the decision of the Seventh Circuit Court of Appeals in *Kosuga* v. *Kelly*, 257 F. 2d 48 (7 Cir. 1958), affirmed 358 U.S. 516, which was cited with approval and followed by the Seventh Circuit in *Meigs* v. *Empire Petroleum Co.*, 273 F. 2d 424 (7 Cir. 1960).

CONCLUSION

In cases where no issue of a federal statute and a state statute seeking to occupy the same regulatory field was even involved, the "universal abhorrence" of mankind at the idea of "double prosecutions" has nevertheless been

declared. *Bartkus* v. *Illinois*, 359 U.S. 121, 151. Though no question of Congressional purpose or intention was posed, prosecution "twice for the same offense, once by a state and once by the United States" has nevertheless been denounced as "an affront to human dignity" and labeled as "dangerous to human freedom". *Abbate* v. *United States*, 359 U.S. 187, 203. The decision of which review is here sought is in substance that Congress intended to permit a universally abhorrent affront to human dignity and danger to human freedom by allowing double antitrust prosecutions of the same people for the same facts. There are some lower court decisions which seem to permit a state antitrust prosecution of a conspiracy in restraint of intrastate commerce even though it may substantially affect interstate commerce where federal antitrust jurisdiction has not been asserted, *but this is the one case by any court anywhere holding that both federal and state antitrust prosecutions may be maintained against the same defendants at the same time on the same facts.* This dangerous decision should be reviewed and reversed because it is contrary to Congressional purpose and intention and repugnant to elementary concepts of justice and fair play. It is a final decision of the state courts in favor of the power and jurisdiction of the state to duplicate a federal prosecution of the same people for the same facts. It is earnestly urged that the state has no such power. "Unless this judgment is reviewable now, Petitioner will • • • face further proceedings in the state courts which the state courts have no power to conduct". *Local Union No. 438* v. *Curry*, *supra*. This is an issue "that it serves the policy underlying the requirement of finality in 28 U.S.C. 1257 to determine now". *Mercantile National Bank* v. *Langdeau*, *supra*. The determination of this issue now can relieve petitioners of harsh and oppressive action through double antitrust prosecutions

never intended by Congress and can dispell a new and ominous cloud which this decision brings over the entire field of federal and state antitrust enforcement policy.

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APPENDIX A

NO. 530,151

THE STATE OF TEXAS

v.

THE SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ET AL.

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
61st JUDICIAL DISTRICT

ORDER SUSTAINING DEFENDANTS' PLEAS IN ABATEMENT AND TO THE JURISDICTION

On the 6th day of November, 1961, in the above styled and numbered cause came on to be heard the plea in abatement and to the jurisdiction of Defendant The Southeast Texas Chapter of National Electrical Contractors Association, as contained in part numbered I of its Second Amended Original Answer herein, and also came on to be heard the pleas in abatement and to the jurisdiction of the Defendants Hirsh Electric Company, The Howard P. Foley Company, Electrical Constructors, Inc., and Pfeiffer Electric Company, each and all of said pleas in abatement and to the jurisdiction being based upon the institution by grand jury indictment and the pendency of a criminal action in the United States District Court, Southern Distirct of Texas, Houston Division, styled Cr.

No. 13,706, United States of America v. Southeast Texas Chapter, National Electrical Contractors Association, et al, in which said Defendants herein filing said pleas in abatement and to the jurisdiction herein are also defendants in said federal action; and came the Plaintiff The State of Texas, by its attorney of record, and came the various defendants by their attorneys of record and announced ready for hearing on said pleas in abatement and to the jurisdiction; and the court having heard and considered the same, together with the evidence introduced thereon and the argument of counsel, is of the opinion and finds that each and all of said pleas in abatement and to the jurisdiction should be in all things sustained and the above styled and numbered cause should be in all things abated and dismissed as to said Defendants;

And it further appearing to the court that the court is also without jurisdiction to proceed with and to try said cause against the Defendants Fischbach & Moore, Inc. and Fisk Electric Company, and that the action is not properly severable as to Defendants Local 716 of International Brotherhood of Electrical Workers, Seiders Electric Company, H. M. Bradley, individually and doing business as Bradley Electric Company, and A. H. Muhl, individually and doing business as Muhl Electric Company, which four last named Defendants are not named as Defendants but are named as co-conspirators in said pending federal action, and that the above cause should therefore be dismissed also as to those Defendants not filing pleas in abatement and to the jurisdiction herein.

It is accordingly ordered, adjudged and decreed that the pleas in abatement and to the jurisdiction of Defendants The Southeast Texas Chapter of National Electrical Contractors Association, Hirsh Electric Company, The

Howard P. Foley Company, Electrical Constructors, Inc., and Pfeiffer Electric Company be and each of them is hereby in all things sustained and that the above styled and numbered cause as to each of said defendants be and the same is hereby in all things abated and dismissed; and it is further ordered, adjudged and decreed that on the basis of the findings hereinabove made, the above styled and numbered cause be and it is hereby in all things abated and dismissed as to the Defendants Local 716 of International Brotherhood of Electrical Workers, Fischbach & Moore, Inc., Fisk Electric Company, Seiders Electric Company, H. M. Bradley, individually and doing business as Bradley Electric Company, and A. H. Muhl, individually and doing business as Muhl Electric Company.

To which judgment and order of the court Plaintiff The State of Texas in open court duly excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas sitting at Houston, Texas.

Entered this 8th day of November, 1961.

s/ Ben F. Wilson
Judge of the District Court
of Harris County, 61st Judicial
District of Texas

APPENDIX B

Opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas

THE STATE OF TEXAS, *Appellant*,

No. 7430 v. SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, et al, ... *Appellees*.

Appeal from the District Court of Harris County, Texas.

Plaintiff-appellant, the State of Texas, on June 18, 1959, filed a civil anti-trust suit under Title 126, Arts. 7426-7447, inclusive, V.A.T.C.S., and the Constitution of Texas, seeking (1) equitable relief against the parties; (2) for statutory civil penalties; (3) a permanent injunction; and, (4) for a forfeiture of a corporate charter of the Southeast Texas Chapter of National Electrical Contractor's Association (hereinafter referred to as N.E.C.A.), against N.E.C.A., et al, for certain alleged unlawful operations, conspiracies and practices in restraint of trade committed wholly within Texas.

On January 11, 1960, a Federal Grand Jury of the Southern District of Texas returned a criminal indictment against a number of the defendants in this case, charging them with violations of the Federal anti-trust laws and alleging certain unlawful operations, conspiracies and practices in restraint of trade, and a violation of interstate commerce. The Sherman Act, 15 USCA § 1, et seq.; Art. 1, U.S. Const. § 8; Art. VI, U.S. Const. § 2.

Certain defendants in this case filed pleas in abatement to the effect that the Federal criminal indictment was based

upon the same alleged unlawful operations, conspiracies, and the same interstate commerce as those alleged in the civil action by Texas. The defendants took the position that the Sherman Act had preempted the field in which the Texas anti-trust laws operate, and that only the Federal courts had jurisdiction. The trial court, finding that the suit was not properly severable as to the other defendants, sustained the pleas and dismissed the case as to all the defendants, holding that the Texas State Court was without jurisdiction because of the Federal criminal indictment. From the judgment of dismissal, Texas has perfected its appeal.

The appellant takes the position that the trial court erred in dismissing the case because the state court's jurisdiction had not been displaced, superseded, or preempted by the Federal criminal indictment, or the Sherman Act.

The United States, by amicus curiae brief takes the position that the Sherman Act does not preempt the field of regulations of interstate trade and commerce, thereby precluding Texas from exercising jurisdiction over the anti-trust matter, in the exercise of its police power.

Texas bases its case upon allegations of unlawful operations and conspiracies for sale and installed prices of electrical equipment, and such operations constitute a fixed, maintained and increased price in violation of the anti-trust laws of Texas.

The Federal criminal indictment is based upon the same transactions; and, a violation of the interstate commerce laws.

In the civil suit by Texas, the "Houston area" is defined as a "portion of Harris County, and Brazoria and Fort Bend Counties, Texas." It alleged that N.E.C.A. was a trade association and had a charter from Texas.

The Federal indictment defines the "Houston area" as follows:

> "As used herein, the term 'Houston area' includes the City of Houston, Texas, and that portion of the State of Texas lying within sixty miles of Houston."

The Federal indictment further alleged:

> "From 75 to 90 percent of the electrical equipment sold and installed in the Houston area is manufactured in states other than Texas and is shipped in interstate commerce from said states to the Houston area for sale and installation therein. In 1956 said interstate commerce was in excess of $6,000,000."

There are no findings of fact or conclusions of law by the trial court. It probably based its decision upon the holding in Commonwealth of Pennsylvania v. Steve Nelson, 350 U.S. 497, 76 Sup. Ct. 477. Three Justices dissented. Nelson was indicted, tried and convicted of the offense of "sedition" by the State of Pennsylvania. He was also indicted, tried and convicted under a Federal indictment for the same offense and transactions. That case is not in point here.

The Texas anti-trust laws have been upheld as valid and constitutional. 29 Tex. Jur. 747 § 6; 58 C.J.S. 998, § 28; 36 Am. Jur. 593, Chap. 6.

Texas bases its civil action on conspiracies in restraint of trade committed wholly within the state. 29 Tex. Jur. 768, § 19. The appellees were not indicted by the courts of Texas. 20 Tex. Jur. 778, § 25.

The Federal government may institute criminal or civil proceedings for violations of the Federal anti-trust laws. 58 C.J.S. 1140, Chap. VIII. A state may seek civil penalties for violations of state anti-trust laws. 58 C.J.S. 1156, Chap. IX.

Neither the Supreme Court of Texas nor the United States Supreme Court has heretofore considered the question of whether a Federal indictment under the Sherman Act is preemptive and excludes Texas from bringing a civil action for an alleged violation of local anti-trust laws. The state court of Wisconsin has held that a Federal action will not affect the right of the state to prosecute their anti-trust violators. State of Wisconsin v. Allied Chemical & Dye Corporation, 9 Wisc. 2d 290, 101 N.W. 2d 133. The Texas courts and the lower Federal courts have made it clear that the Texas courts can proceed, in anti-trust suits, without reference to a Federal court action, even though the same parties and the same subject matter are involved in both actions. Bergholm v. Peoria Life Ins. Co., T.C.A., 63 S.W. 2d 1064, n.w.h.; Byrd-Frost, Inc. v. Elder, 93 Fed. 2d 31; Sessions Company v. W. A. Sheaffer Pen Company, T.C.A., 344 S.W. 2d 180, er. ref.

Preemption has always been decided on the basis of whether or not, as applied to this particular case, the State laws are repugnant and in conflict with the Federal law. There have been no final convictions in either case, and both Texas and the Federal government by their pending actions are seeking to examine the lawfulness of the acts of the appellees. The same consideration would be involved and the preemption defense would be available, if no Federal indictment was pending. State of Wisconsin v. Allied Dye and Chemical Company, supra.

We are called upon to decide whether or not Federal laws regulating anti-trust and interstate commerce preempts the field in which the anti-trust laws of Texas operate. This does not seem to be the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218. The State is entitled to proceed. State of North Carolina v. United States of America, 325 U.S.

507; State of Florida v. United States of America, 282 U.S. 194; George M. Napier v. Atlantic Coast Line Railroad Company, 272 U.S. 605. State anti-trust laws are on a different footing from state labor legislation, the sedition laws, and others, that the United States Supreme Court has struck down on preemption grounds. In the anti-trust laws, however, the Sherman and Clayton Acts, exclusive of these exceptions, have been enforced concurrently by the Department of Justice, Federal Trade Commission, the states, and private litigants. The state protection of its own commerce against conspiracies in restraint of trade which also violate interstate commerce, is supplementary to the Federal regulatory scheme. It operates in areas not reached by Federal authority. Compare Commonwealth of Pennsylvania v. Steve Nelson, supra, with Willard Uphaus v. Louis C. Wyman, 360 United States 72.

The judgment of the trial court is reversed and the case is reinstated for a trial upon its merits.

Reversed and remanded.

MATT DAVIS
Associate Justice

June 12, 1962.
Filed June 12, 1962.

APPENDIX C

Articles 7426-7428, 7429-7430, 7436, Vernon's Annotated Texas Civil Statutes

ART. 7426. "TRUSTS"

A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either, two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix, or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. Acts 1903, p. 119.

ART. 7427. "MONOPOLY" DEFINED

A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

ART. 7428. CONSPIRACIES AGAINST TRADE

Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling

to any other person, firm, corporation or association of persons.

3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this subdivision of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with the goods, wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons. Acts 1903 p. 119; Acts 1947, 50th Leg. p. 530, ch. 310 § 1.

ART. 7429. ACTS ILLEGAL

Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal. Acts 1903 p. 119.

ART. 7430. CHARTERS FORFEITED

The Charter of any corporation chartered under the laws of this State, adjudged guilty of violating any provision of this subdivision may be forfeited at the request of the Attorney General, if in the judgment of the court before whom the litigation is pending, the public interest requires it, provided, the forfeiture of the charter shall be in addition to all other penalties prescribed by law. Acts 1903 p. 119; Acts 1923 p. 12.

ART. 7436. PENALTIES; VENUE; FEES

Each firm, person, corporation or association of persons, who shall in any manner violate any provision of this subdivision shall for each day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas in the district court of any county in the State of Texas, and venue is hereby given to such district courts. When any such suit shall have been filed in any county and jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court. It shall be the duty of the Attorney General or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same. The fees of the district or county attorney for representing the State in all anti-trust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this State, shall be ten per cent of the amount collected up to and including the sum of fifty thousand dollars, and five per cent of all sums in excess of the first fifty thousand dollars, to be retained by him when collected, and all such fees which he may collect shall be over and above the fees allowed under the general fee bill. The provisions of this subdivision as to fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court nor to any monies to be hereafter collected upon such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise. The district or county attorney who joins in the institution or prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this State, who shall, previous to the collection of such penalties, cease to hold office, shall be entitled to an

equal division with his successor of the fee collected in said cause. In case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such prosecuting officer making such contract and thereafter retiring from office. In case any suit is compromised before any final judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. Acts 1903 P. 119; Acts 1909 P. 281.

The pertinent federal statutes involved herein are:

a. Section 1 of the act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, c. 647, 26 Stat. 209, 15 U.S.C. Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

b. Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, c. 647, 26 Stat. 209, 15 U.S.C. Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misde-

meanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

APPENDIX D

Resume of Legislative History Establishing Congressional Intent that the Sherman Act Provide the Exclusive Remedy for all Restraints of Trade in Interstate Commerce or Having a Substantial Effect on Interstate Commerce.

Senator George F. Hoar of Massachusetts, a member of the Judiciary Committee that drafted the Sherman Act,[1] stated in the debates preceding its passage:

> "I suppose that, so far as this is a regulation of the commerce between this country and a foreign country or between different States of this country the jurisdiction of Congress is conclusive over it; the States can not touch it." 21 Cong. Rec. 2567, reprinted in *Bills and Debates in Congress Relating to Trusts*, S. Doc. No. 147, 57th Cong. 2d Sess. 160 (1903) (hereinafter cited as *Bills and Debates*).

Senator John Sherman of Ohio said:

> "Sir, the object aimed at by this bill is to secure competition of the productions of different States which necessarily enter into interstate and foreign commerce. These combinations strike directly at the commerce over which Congress alone has jurisdiction." 21 Cong. Rec. 2462, *Bills and Debates*, p. 106.

The Sherman Act "occupies the entire field" of protecting interstate commerce against antitrust violations which substantially affect that commerce. In the last speech preceding unanimous passage of the Sherman Act in the House of Representatives, Congressman John W. Stewart of Vermont[2] said:

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[1] Hoar also served on the various Conference Committees which dealt with the Sherman Act.

[2] Stewart was a member of the House Judiciary Committee that reported favorably on the bill that was passed as the Sherman Act. He also served on the Conference Committees.

> "The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States." 21 Cong. Rec. 6314, *Bills and Debates*, p. 106.

The comprehensive sweep of the Sherman Act has been frequently recognized by the Supreme Court, which has declared that Congress meant "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements," *United States* v. *South-Eastern Underwriters Ass'n*, 332 U.S. 533, 558, (1944), and to exercise "all the power it possessed," *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). See *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 297 (1945) ("no area of its constitutional power unoccupied.")

In addition to the quotation above, Senator Hoar[3] also made the following remarks in floor debate:

> "The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the States cannot regulate by penal enactment . . ." 21 Cong. Rec. 1765, *Bills and Debates*, p. 72.

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[3] Senator Hoar has frequently been credited with the authorship of the Sherman Act. See, e.g., Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 207, 218-19 (1926). Indeed, Hoar himself claimed the authorship. *Hoar, Autobiography of Seventy Years*, vol. II, p. 364 (1903). More recent scholarship, however, has proved that most of the credit for authorship belongs to Senator George F. Edmonds of Vermont, Chairman of the Judiciary Committee. See *Thorelli, The Federal Antitrust Policy*, 210-14 (1955). Hoar was, however, principal floor spokesman for the Judiciary Committee. His remarks may be considered authoritative as to the intent of Congress.

> "The only jurisdiction over this subject is the jurisdiction to protect interstate and foreign commerce. That we have; that we can regulate; that the States cannot regulate under the recent railroad decisions of the Supreme Court overruling a case from Illinois and that class of decisions where it was held that the jurisdiction was concurrent."[4] 21 Cong. Rec. 2567, Bills and Debates, p. 160.

These unequivocal statements by the principal spokesman for the Sherman Act show that the Congress did not anticipate concurrent federal and state prosecutions for the same acts. The Congress considered that, on the one hand, states would be free to prosecute antitrust violations against commerce wholly within their borders. "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 546 (1935); see *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir.), cert. denied, 361 U.S. 84 (1959). On the other hand, Congress intended the Federal Government to have exclusive jurisdiction over all conspiracies or monopolies having a substantial effect on commerce which it had constitutional power to regulate. State power over antitrust matters would not, in the view of Congress, be concurrent with federal power, but rather would only operate in areas where the Federal Government had no constitutional power to enter.

The favorable report of the House Judiciary Committee[5] on the Senate bill that was eventually enacted spells

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[4] The case to which Senator Hoar refers is apparently *Bowman* v. *Chicago and N. Ry.*, 125 U.S. 465 (1888).

[5] H.R. Rep. No. 1707, 51st Cong. 1st Sess. (1890); Bills and Debates, pp. 325-26.

out the Committee's understanding that federal and state power would operate in distinct and separate areas. It says:

> "No attempt is made to invade the legislative authority of the several states or even to occupy doubtful grounds. . . . Congress has no authority to deal, generally, with the subject within the States, and *the States have no authority to legislate in respect of commerce between the several States or with foreign nations.*" (Emphasis added.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 920

THE SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ET AL., *Petitioners,*

v.

THE STATE OF TEXAS, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

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THE STATE OF TEXAS, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

Respondent fails completely to meet Petitioners' first question because no case cited by Respondent even involved the attempted antitrust prosecution of the same petitioner on the same facts by both the federal and state governments.

Respondent's opposition to the Petitioners' second question[1] (namely, whether the Sherman Act occupies the field as to restraints of trade subject to federal power under the Commerce Clause) relies principally on *Standard Oil Co. of Kentucky* v. *Tennessee*, 217 U.S. 413 (1910). This Reply Brief is limited to pointing out two reasons why the *Standard Oil* case does not support Respondent's contentions.

[1] Petition for Certiorari, p. 5. Respondent appears to agree in substance that this case presents this issue. See Brief in Opposition, p. 3, Question 1.

1. This Court Has Never Considered the Effect of the Sherman Act on State Power

In the first place, *Standard Oil Co. of Kentucky* v. *Tennessee* concerns only those limits that the Commerce Clause places on state action; it does not deal with the extent to which the Sherman Act reserves to the federal government power over trade restraints "in" or "affecting" interstate commerce. In the second place, Respondent treats the *Standard Oil* case as if it had been decided this year; no allowance is made for the sweeping changes that have occurred over the last fifty-three years in judicial attitudes regarding the scope of the Sherman Act and the Commerce Clause.

Contrary to the Brief in Opposition,[2] neither the *Standard Oil* case nor any other decision of this Court has ever passed on the question as to whether the Sherman Act excludes concurrent state prohibitions against conspiracies in restraint of trade.[3] All parties agree that the case at bar poses this important question squarely.[4] The Court should embrace this opportunity to settle this grave constitutional problem, a problem that is arising with increasing frequency and intensity as state interest in antitrust enforcement awakens.[5]

Standard Oil Co. of Kentucky v. *Tennessee* upheld Tennessee's action against a company for giving oil—

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[2] Pp. 6, 10-11.

[3] *Accord*, Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1478-83 (1961).

[4] See n. 1, *supra;* Petition for Certiorari in No. 765, p. 4, Question 1.

[5] See, *e.g.*, Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, Address, A.B.A. Section of Antitrust Law, Annual Convention, Aug. 7, 1962; REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS (1957); Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753 (1961); Stern, *A Proposed Uniform State Antitrust Law*, 39 TEXAS L. REV. 717 (1961).

not in interstate commerce to four local merchants for the purpose of inducing them to revoke orders for oil to be shipped from Pennsylvania by defendant's competitor. The *Standard Oil* case held only that the Commerce Clause did not invalidate Tennessee's action. The case at bar raises the entirely different question of whether the Sherman Act, by occupation of the field, precludes overlapping and duplicating state action.

The apparent reason why the *Standard Oil* case did not address itself to the Sherman Act's effect on permissible state action is that, when that case was decided in 1910, the power of Congress (at least with respect to restraints of trade) was generally not deemed to extend beyond transactions actually "in" interstate commerce.[6] For this reason, it would not have been thought to extend to the transactions involved in the *Standard Oil* case. Not until four years later, in the *Shreveport Rate Cases*,[7] did this Court hold that the Congress had power, under the Commerce Clause, to regulate transactions not actually "in" but substantially "affecting" interstate commerce.

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[6] *Compare* Swift and Co. v. United States, 196 U.S. 375 (1905); Northern Securities Co. v. United States, 193 U.S. 197 (1904) *with* Hopkins v. United States, 171 U.S. 578 (1898); United States v. E. C. Knight Co., 156 U.S. 1 (1895). See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, ch. VII (1937).

[7] Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914):

> "The formulation of the Shreveport doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of Cooley v. Port Wardens, 12 How. 299. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232 (1948).

Mr. Justice Holmes' decision in *Standard Oil Co. of Kentucky* v. *Tennessee* demonstrates that this Court did not consider there to be any federal statute that was concurrent with the Tennessee antitrust law as it was applied in that case. Speaking for a unanimous Court, Holmes wrote:

> "How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power. See *Field* v. *Barber Asphalt Paving Co.*, 194 U.S. 618."[8]

Field v. *Barber Asphalt Paving Co.* says of the Sherman Act that:

> "It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."[9]

From this it appears that Holmes was certain that the Congress had not acted, and he even raised a question as to whether it had power to act in the matter.

Because *Standard Oil Co. of Kentucky* v. *Tennessee* was decided on the basis that the state had acted only against transactions outside the scope of the Sherman Act and outside the scope of any other federal statute, Respondent's reliance on that case is entirely misplaced. To the extent that the *Standard Oil* case has any pertinence, this Court's careful articulation that the transactions involved were not then subject to any federal statute serves to warn that states may have to yield when conduct does become subject to federal regulation.

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[8] 217 U.S. at 422.

[9] 194 U.S. at 623-24.

In addition to *Standard Oil Co. of Kentucky* v. *Tennessee*, Respondent cites three other decisions of this Court to support its contention that state and federal antitrust regulation may operate concurrently.[10] In the first, *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86 (1909), this Court had no occasion to consider transactions concerning interstate commerce because the trial court had instructed the jury that the state antitrust law had "no reference to . . . arrangements of any character concerning subjects of interstate commerce . . ."[11] Likewise, the two other Supreme Court decisions cited by Respondent in this regard[12] do not address the question of whether the Sherman Act precludes state action against trade restraints affecting interstate commerce. Respondent has not cited, and Petitioners have not found, any decision of this Court that considers the preemption issue raised by the case at bar.

2. The Sherman Act Occupies the Field as to Restraints of Trade Subject to Federal Power Under the Commerce Clause

During the fifty-three years that have passed since the decision in *Standard Oil Co. of Kentucky* v. *Tennessee*, the Sherman Act and the Commerce Clause both have broken free of the conceptual bonds that confined their scope in 1910. See, *e.g.*, *Mandeville*

[10] Brief In Opposition, 11-12.

[11] 212 U.S. at 99.

[12] Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949); Watson v. Buck, 313 U.S. 387 (1941). Although the preemption issue was neither presented nor adjudicated in the Giboney case, in March 1955 this Court held in Weber v. Anheuser-Busch, Inc. 348 U.S. 468, that the same Missouri antitrust statute involved in Giboney was preempted by the National Labor Relations Act where interstate commerce was affected. In Weber this Court said of Giboney, "No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion." 348 U.S. at 481 n. 9.

Island Farms, Inc. v. *American Crystal Sugar Co.*, *supra* n. 7, 334 U.S. 219 (1948); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). As the reach of the Sherman Act has expanded, there has been a corresponding limitation on the areas in which either conflicting or coincidental state regulation of restrictive trade practices may permissibly function.

This is so because, when the Congress passed the Sherman Act, it made clear its intent to regulate only activities that the states could not touch. Senator George F. Hoar, floor manager for the legislation, stated, "the jurisdiction of Congress is conclusive over it [the commerce that the bill would regulate]; the States cannot touch it." 21 CONG. REC. 2567. Senator John Sherman spoke of the act as regulating "the commerce over which Congress alone has jurisdiction." 21 CONG. REC. 2462.

Since the Congress intended the Sherman Act to occupy its field to the fullest possible extent,[13] overlapping state regulation is precluded from that field regardless of whether it conflicts or coincides with the federal purpose. See *Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Charleston & W. C. Ry.* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915). Neither in 1890, when the Sherman Act was passed, nor in 1910, when this Court decided *Standard Oil Co. of Kentucky* v. *Tennessee*, were the states free to prosecute citizens for transactions that fall within the field occupied by the Sherman Act, nor are they free to do so today.

In summary, the case at bar raises an important constitutional question of first impression. Almost seventy-three years have passed since enactment of the Sherman Act, and this case now provides an opportunity for the "long overdue Supreme Court ruling,

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[13] Cases cited in Petition for Certiorari, Appendix D, p. 17a.

similar to those delivered recently in other areas of constitutional law, on the role that the states can play in antitrust regulation." Note, *The Commerce Clause and State Antitrust Regulation, supra* n. 3, 61 COLUM. L. REV. 1469, 1473 (1961) (Footnote omitted).

CONCLUSION

For the reasons set out above and in the Petition for Certiorari, petitioners respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas dated June 12, 1962.

Respectfully submitted,

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